Supreme Court, U.S.
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No. 02-9410

IN THE
Supreme Court of the United States

MICHAEL D. CRAWFORD
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate the Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Supreme Court (J.A. 2-19) is published at 147 Wn.2d 424, 54 P.3d 656 (Wash. 2002). The opinion of the Washington Court of Appeals (J.A. 20-37) was unpublished. The relevant order of the Superior Court (J.A. 38-77) is unpublished.

JURISDICTION

The Washington Supreme Court issued its decision in this case on September 26, 2002, and denied Petitioner's timely petition for rehearing on December 12, 2002 (J.A. 78). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This case presents this Court with an opportunity to clarify the operation of the Confrontation Clause and to refasten this critical provision of criminal procedure to its historical and textual underpinnings. At issue is whether the court in Petitioner's criminal trial erred in allowing the State to introduce a tape recording and accompanying transcript of the police's custodial examination of his potential accomplice, who was unavailable to testify at trial. During the examination, the suspected accomplice denied any significant involvement in the alleged felony and directly implicated Petitioner in the incident. The Washington Court of Appeals held that the admission of this custodial statement violated the Confrontation Clause because several circumstances surrounding its making indicated that it was unreliable. But the Washington Supreme Court reversed, ruling that the potential accomplice's statement was sufficiently reliable for confrontation purposes, irrespective of the circumstances surrounding its making, because its content "interlocked" with

Petitioner's own custodial statement. This "interlocking" rationale requires this Court to evaluate the nature and propriety of the reliability-based approach that has framed its recent applications of the Confrontation Clause.

1. On August 5, 1999, Petitioner Michael D. Crawford and his wife Sylvia went to the apartment of Kenneth Lee. An argument developed and a violent altercation suddenly followed. During the scuffle, Petitioner received a cut on his hand that required twelve stitches to close, Sylvia got blood on her sweater, and Petitioner stabbed Lee in the stomach, seriously injuring him.

That night, the police arrested Petitioner and Sylvia and interrogated them in separate rooms at the Olympia Police Department. At two different points of each person's interrogation, the police tape recorded what the State calls "statements" from the suspects. In each of these "statements," the Crawfords provide a series of responses to police officers' specific questions, much as a party would at a deposition. During his first statement, Petitioner waived his *Miranda* rights and said that he and Sylvia had run into Lee earlier in the day in downtown Olympia and that Lee had told them that they could come over to his apartment later to collect some money that he owed them. Petitioner told the police that after they arrived at the apartment, he left to go to the store. He said that he returned to the apartment to find Lee making sexual advances toward Sylvia. A tussle suddenly resulted during which Lee reached for something, Petitioner's hand got sliced open, and Petitioner stabbed Lee. J.A. 113-19.

At the outset of Sylvia's first interrogation, the officer also read Sylvia her *Miranda* rights. She asked whether she would be "let go until there was a lawyer present" if she invoked her right to counsel. J.A. 80. The officer responded that while a lawyer could be appointed to represent her, "I don't know if you'll be let go or detained more at this point or not. It depends on how the investigation continues. Ok, so I can't answer if you'll be detained longer or not. At this point this is under investigation and that's where we're at, at this point."

J.A. 81. Sylvia then waived her rights. Once questioning began, Sylvia's responses were similar to Petitioner's, but she said that Lee invited Petitioner and her over to his house "to go drinking." J.A. 86. She also acknowledged that she had been "pretty intoxicated" during the day. J.A. 88. Finally, she said that she was behind a wall during the stabbing and, therefore, did not see what happened. J.A. 93.

A few hours later, from about 11:00 pm until 1:00 am, Petitioner and Sylvia each responded to additional police questioning on tape. Both said that they went to Lee's apartment to demand that he pay up on a debt, and (in a change from their first statements) that Lee had actually sexually assaulted Sylvia several weeks ago, not earlier that day. The second statements, however, differed from each other somewhat concerning the actual stabbing. When the interrogating officer asked Petitioner, "Did you ever see anything in [Lee's] hands?," Petitioner responded that "I coulda swore I seen him goin' for somethin' before, right before everything happened. . . . I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive." J.A. 155 (second ellipsis in original).

When the officer asked Sylvia, "did [Lee] do anything to fight back from this assault?," the following colloquy took place, as transcribed by the Police Department:

> A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what
> Q: after he was stabbed
> A: he saw Michael coming up. He lifted his hand . . . his chest open, he might have went to go strike his hand out or something and then (inaudible)
> Q: okay, you, you gotta speak up
> A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open as

> he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)
> Q: okay, when he's standing there with his open hands you're talking about [Lee], correct
> A: yeah, after, after the fact, yes
> Q: did you see anything in his hands at that point
> A: (pausing) um um (no)

J.A. 137 (ellipses and parentheticals in original). Sylvia also told the officers that Petitioner had been "infuriated," "enraged," and "past tipsy," and she stated that Petitioner had said before the incident that Lee "deserves an ass whoopin'." J.A. 131-32, 135. Near the end of her examination, Sylvia denied any involvement in the actual stabbing. "I did not stab [Lee]," she said, "I saw Michael stab him." J.A. 139, 134. She quickly added, though, that during the scuffle, "I shut my eyes and I didn't really watch. I was like in shock." J.A. 134.

2. The State filed an information against Petitioner charging him with attempted murder in the first degree with a deadly weapon and assault in the first degree with a deadly weapon. Sylvia was a "potential accomplice" because, even according to her own admissions, she "showed [Petitioner] where to find Lee[,] was present through the duration of the violent encounter, . . . walked away from the stabbing with [Petitioner] and did not turn to the police when she had the opportunity." J.A. 14. The State nevertheless declined to charge her at that time with any crime.

The key issue at Petitioner's trial was whether he acted in self-defense. Petitioner took the stand and testified that after asking Lee whether he had tried to rape Sylvia, Lee rushed at him. Petitioner thought that Lee had a weapon. So, in Petitioner's words, "I thought that I was going to get stabbed, and I just pulled my knife and figured I better get him first." Report of Proceedings at 276. A forensic scientist testified that he could not determine whether Lee was moving forward or backward when he got stabbed, but that it appeared that Crawford had been in a blocking motion (a defensive posture) during the altercation.

Sylvia did not testify. Rather, the State and Petitioner stipulated that Washington's marital privilege statute rendered her unavailable to do so because she and Petitioner wanted to invoke the privilege. J.A. 25, 39-43.[1] The State, however, sought to offer its tape recording and accompanying transcript of Sylvia's second custodial statement as evidence that Lee did not reach for a weapon until after Petitioner stabbed him. Petitioner objected that this admitting this material would violate the Confrontation Clause. J.A. 41-42. The State acknowledged that the Clause was applicable under these circumstances but contended that Sylvia's statement was reliable enough to be admissible. J.A. 44-46.

The trial court, after discussing this Court's plurality decision in *Lilly v. Virginia,* 527 U.S. 116 (1999) – which elaborates on the reliability-based Confrontation Clause framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980) – sided with the State and held that the statement was admissible. The court stated that, in light of other evidence in the case, Sylvia's statement did not appear to "shift blame, exculpate herself and inculpate [Petitioner]." J.A. 61. The court further reasoned:

> So when I take the statement of Sylvia Crawford in the context of the statement of Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call. . . .
>
> . . . I am concluding, given my analysis of the statements and the standard set forth in *Lilly vs. Virginia,* that the type of potential accomplice statement against penal interest made by Sylvia

[1] The martial privilege statute was not the only law standing in the way of Sylvia testifying. Even if Petitioner had tried to force Sylvia to testify, she still could have invoked her Fifth Amendment right to remain silent to avoid taking the witness stand. At the time of Petitioner's trial, the State was considering filing charges against Sylvia for her role in the assault, and it did so shortly after Petitioner's trial concluded.

> Crawford is sufficiently reliable concerning what occurred at the time of the stabbing and with respect to who stabbed Mr. Lee that I would not preclude the State from attempting to admit it in its case in chief.

J.A. 61-62.

Later in the proceedings, the State played the tape of Sylvia's statement and introduced the accompanying transcript. And at closing argument, the prosecution stated that "[t]he defendant's own wife gives damning evidence in this case. . . . She describes an intentional stabbing of Mr. Lee and completely refutes [Petitioner's] claim of self-defense." Report of Proceedings at 468.

The jury found Petitioner not guilty of the attempted murder charge but guilty of the assault charge. On November 19, 1999, the court sentenced him to 174 months in prison.

On November 24, 1999, the State filed (and later amended) an information against Sylvia for her role in the incident, charging her with rendering criminal assistance in the first degree and assault in the second degree. Brief in Opp. at 1. Sylvia pleaded guilty on January 18, 2000 to the criminal assistance charge and to assault in the third degree. *Id.* She was sentenced to nine months in county jail. *Id.* App. F at 5.

3. On appeal, the Washington Court of Appeals reversed Petitioner's conviction on the ground that the admission of Sylvia's second statement violated the Confrontation Clause. It began by noting that this Court's *Roberts* framework permits the introduction of hearsay evidence against criminal defendants if it "(1) falls within a firmly rooted hearsay exception or (2) contains 'particularized guarantees of trustworthiness.'" J.A. 23 (quoting *Roberts*, 448 U.S. at 66). It also stated that although "parts of Sylvia's second statement," the only one offered for the truth of the matter asserted, "were against her penal interest" (and thus admissible under state hearsay law) because they "could give rise to accomplice liability" J.A. 26, the against-penal-interest exception to the hearsay rule is not a "firmly rooted" one. J.A. 24.

The court of appeals then applied a nine-part test "to determine whether an out-of-court statement satisfies the reliability prong" of the *Roberts* framework and held that Sylvia's second statement was "plainly untrustworthy," J.A. 33, because: Sylvia had a motive to lie; Sylvia gave two different versions of her statement within four hours; Sylvia's statement was not spontaneous, but rather was given under mandatory police questioning; the statement described past events; and "cross-examination could reveal that she lacked knowledge of what happened" because "Sylvia stated that she shut her eyes during the stabbing." J.A. 28-31. The court of appeals added that although the Washington Supreme Court had previously held that an accomplice's confession could be deemed reliable if it "interlocks" with the defendant's confession, "that reasoning does not apply in this case" because Petitioner's and Sylvia's statements "differ regarding whether Lee was armed when [Petitioner] stabbed him." J.A. 31-32.

The court of appeals next held that state evidence law barred the admission of Sylvia's first statement because, as evidence of supposed fabrication, "it is relevant only if the second statement is admitted." J.A. 25, 33. Lastly, the court of appeals concluded that the admission of Sylvia's statements was not harmless because "Sylvia's second statement refutes [Petitioner's] claim of self-defense" and sends the "overwhelming message that the jury cannot trust [Petitioner's story]." J.A. 33-34.

Chief Judge Armstrong dissented. He agreed with the majority that the portions of Sylvia's statement describing Petitioner's mental state and his feelings toward Lee were not against her penal interest, but he asserted that this was harmless error. J.A. 35 & n.3. The dissent then argued that the portion of Sylvia's statement regarding the stabbing was admissible under both hearsay law and the Confrontation Clause because it interlocks with Petitioner's statements. In the dissent's view, "even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither [Petitioner] nor

Sylvia clearly stated that Lee had a weapon in hand from which [Petitioner] was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." J.A. 36-37.

4. The Washington Supreme Court granted the State's petition for discretionary review, reversed and reinstated Petition's conviction. The Court initially confirmed that Sylvia was unavailable to testify as a matter of state law due to the invocation of the state marital privilege statute but that her custodial statement was admissible if it satisfied state rules of evidence and federal confrontation standards. It then held that Sylvia's whole second custodial statement – including the portions saying that Petitioner, not her, had stabbed Lee and saying that Petitioner had been "infuriated" and had stated that Lee "deserves an ass whoopin'" – was against her penal interest and thus admissible under state hearsay law. J.A. 14-15.

Turning to the Confrontation Clause, the Court adopted the reasoning from the dissent below, holding the "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause" because "both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon." J.A. 18. The Court deemed it irrelevant whether the circumstances surrounding Sylvia's statement also indicated that it was trustworthy. "[A]n interlocking confession," the Court explained, "serve[s] the same purpose as the nine-factor test in assessing reliability." J.A. 16.

5. Petitioner moved for rehearing, but the Washington Supreme Court denied this motion without comment. J.A. 78.

6. This Court granted certiorari. 123 S. Ct. 2275 (2003).

SUMMARY OF ARGUMENT

The Washington Supreme Court erred in holding that the Confrontation Clause permitted the State to introduce Sylvia's custodial examination against Petitioner.

I. The Confrontation Clause prohibits the government from introducing any *ex parte* "testimonial" statements, such as an accomplice's custodial examinations, against the accused.

A. The common law right to confrontation, which the Framers incorporated into Confrontation Clause, solidified in response to the notorious English prosecutions of Sir Walter Raleigh and others on the basis of incriminating *ex parte* depositions and accomplice confessions. Such *ex parte* testimony, scholars such as Hale and Blackstone observed, tended to produce incomplete, slanted, misleading, and even inaccurate statements. The resulting likelihood that defendants might be convicted on this type of faulty evidence was deemed unacceptable. Accordingly, the rule of confrontation required that all incriminating testimony be given face-to-face and subject to cross-examination. If an accomplice confessed and became unavailable for trial, it was settled that the confession "cannot be made use of as evidence against any others whom on his examination he confessed to be in the [crime]." *Case of Thomas Tong,* Kelyng J., 17, 18, 84 Eng. Rep. 1061-62 (1662).

American courts consistently have adhered to this traditional rule. Chief Justice Marshall described the Confrontation Clause, consistent with other early American decisions, as commanding that "where A., B., and C. are indicted for murdering D., . . . the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others." *United States v. Burr,* 25 F. Cas. 187, 194 (C.C. Va. 1807) (No. 14,694). This Court, in turn, has found the Clause violated each time it has addressed a case in which a nontestifying accomplice's custodial confession was admitted against the accused. Indeed, just as at common law, the landscape of this Court's jurisprudence dictates that the government may not convict a defendant through any testimonial statements – that is, statements given in connection with its investigation or prosecution – that have not been (or cannot be) subjected to cross-examination.

B. Applying the testimonial standard to the facts of this case yields a straightforward result: Petitioner's confrontation rights were violated because the State introduced a nontestifying accomplice's custodial examination implicating him in the charged offense. This bright-line rule forbidding the

introduction of such statements renders irrelevant the Washington Supreme Court's conclusion that Sylvia's custodial examination was "reliable" because it "interlocked" with Petitioner's custodial statement. The right to confrontation is a categorical requirement that the government prove its case through live testimony that is subject to cross-examination, and the State did not do so here.

C. To the extent that the framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980) – which suggests that testimonial statements that have not been subjected to cross-examination are admissible if courts deem them reliable – dictates a contrary result, that framework should be abandoned. The framework contravenes the history, purpose, text, and structure of the Confrontation Clause – each of which conceptualizes confrontation as a procedural rule to be enforced even when adverse *ex parte* testimony appears trustworthy. The Clause is not intended, as *Roberts* would have it, to be a case-by-case measuring stick supervising the reliability of all incriminating hearsay evidence.

The *Roberts* framework also falters in practice. It breeds inconsistent and confusing results in an area in which certainty and predictability are vital. And it allows courts to invoke reasoning strikingly reminiscent of Raleigh's judges in order to admit incriminating statements that lie at the heart of the evil to which the Confrontation Clause is directed. In all events, the time has come to restore the Clause to its traditional, procedural role of requiring that testimonial statements – and only testimonial statements – be subjected to cross-examination.

II. Even if this Court applies the *Roberts* framework here, it still should reject the Washington Supreme Court's holding that Sylvia's examination is reliable, and hence admissible, because it "interlocks" with Petitioner's custodial statement.

A. Evidence that an accomplice's custodial statement interlocks with the defendant's is irrelevant to whether it is reliable – or, as *Roberts* puts it more specifically, whether it contains "particularized guarantees of trustworthiness." 448 U.S. at 66. In *Idaho v. Wright,* 497 U.S. 805 (1990), this Court

held that the particularized guarantees inquiry is limited to those circumstances that surround the making of the statement and that potentially make it inherently worthy of belief. The prosecution thus may not "bootstrap" on other evidence, such as the defendant's prior statements, to make a nontestifying accomplice's custodial statement appear more reliable.

B. Even if the interlocking nature of Sylvia's statement were relevant to the particularized guarantees inquiry, "the totality of the circumstances" surrounding its making, *Wright,* 497 U.S. at 820, still make it clear that the statement is *not* reliable. Sylvia's statement was made to prosecutorial authorities while in custody for suspected involvement in a felony. After the police told her that it "depend[ed] how the investigation continue[d]" as to whether she would be "detained more at this point or not," J.A. 81, she responded to the officers' leading questions by placing responsibility for the alleged assault on Petitioner's shoulders. What is more, Sylvia acknowledged that she had been "pretty intoxicated" and "like in shock" during the altercation, J.A. 88, 134, which would have impaired her perceptions. She even stated that she did not really see the critical events. Finally, Sylvia offered two inconsistent stories during a four-hour span, and her custodial statement interlocks with Petitioner's merely in the sense that it, like his, is ambiguous as to whether the alleged victim instigated the incident by attacking Petitioner with a weapon.

ARGUMENT

I. The Admission of Sylvia's Recorded Custodial Examination Violated the Confrontation Clause Because It Constituted Incriminating "Testimony" That Was Not Subjected To Cross-Examination.

A. The Confrontation Clause Traditionally Prohibits the Introduction of *Ex Parte* Testimonial Statements, Including Accomplices' Custodial Confessions, Against Criminal Defendants.

This Court repeatedly has noted that "[t]he right to confrontation did not originate with the Sixth Amendment, but

was a common-law right," *Salinger v. United States,* 272 U.S. 542, 548 (1926), "which had been previously adopted in the several states." *United States v. Reid,* 53 U.S. (12 How.) 361, 364 (1851); *see also Lilly v. Virginia,* 527 U.S. 116, 141 (Breyer, J., concurring); 3 Joseph Story, Commentaries on the Constitution of the United States 662 (1833) (Sixth Amendment "follow[ed] out the established course of the common law in all trials for crimes," including right to confrontation). An examination of (1) this common law right to confrontation, (2) the Framers' understanding of that right, and (3) this Court's applications of it demonstrates that the Confrontation Clause prohibits the admission of all *ex parte* testimonial statements, including accomplices' custodial confessions, against criminal defendants.

1. The Development of the Right to Confrontation at Common Law.

The right to confrontation has "a lineage that traces back to the beginnings of Western legal culture." *Coy v. Iowa,* 487 U.S. 1012, 1015 (1988). The ancient Hebrews and the Romans required accusing witnesses to give their testimony in front of the defendant. *See id.*; Deut. 19:15-18; Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause,* 34 Va. J. Int'l L. 481, 485-92 (1994) (recounting several examples in early Roman law). A twelfth-century treatise on ecclesiastical law in Europe likewise provided that "[i]in civil cases absent persons present testimony . . . when they cannot appear . . . . But in criminal cases absent persons *never* give testimony, except against the contumacious when the case has already commenced." *Id.* at 513 (translating Summa "Magister Gratianus in hoc opera" on C.3 q.9 (c. 1160 or 1170), *in* The Summa Parisiensis on the Decretum Gratiani 123 (Terrence P. McLaughlin ed. 1952). Even as continental Civil Law shifted towards more inquisitorial practices, the medieval English legal system generally adhered to the open and confrontational method of taking testimony. *See* John Fortescue, On the Laws and Governance of England 38-40 (1997).

"[T]he particular vice," however, "that gave impetus to the confrontation claim" was the emergence in sixteenth century England of the continental ritual of trying defendants on evidence that "consisted solely of ex parte affidavits or depositions." *California v. Green,* 399 U.S. 149, 157 (1970); *see also* 1 James Stephen, A History of the Criminal Law of England 221, 325 (1883). Magistrates generated these statements by examining alleged accomplices and other witnesses prior to trial. *Id.* The examinations were "intended only for the information of the court. The prisoner had no right to be, and probably never was, present." *Id.* at 221. At the trial itself, in turn, "[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.,* the witnesses against him, brought before him face to face." *Id.* at 326; *see also* 9 W.S. Holdsworth, History of the English Law 228 (1926). Yet "[t]he crown was not bound" by any clear rule "to produce its witnesses to be cross-examined by the accused," so courts sometimes refused these demands for confrontation. 9 Holdsworth, *supra,* at 224, 228.

The "infamous" trial of Sir Walter Raleigh for high treason in 1603 exemplified the unfairness of this state of affairs. *White v. Illinois,* 502 U.S. 346, 361 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see generally* 1 Stephen, *supra,* at 333-36; 9 Holdsworth, *supra,* at 216-17, 226-28. The principal evidence against Raleigh was a transcribed examination of Lord Cobham, Raleigh's alleged co-conspirator, in which Cobham inculpated himself and Raleigh in a plot to seize the throne. When the prosecution presented this evidence, Raleigh demanded to "let my Accuser come face to face." *Trial of Sir Walter Raleigh,* 2 How. St. Tr. 1, 19 (1809). Prior to trial, Cobham had written a letter absolving Raleigh in the plot, and Raleigh "believed that Cobham would now testify in his favor." *Green,* 399 U.S. at 157 n.10. But the judges stated that "the law of the realm," which they construed as barring one charged party from

appearing at the trial of another, dictated that "lord Cobham cannot be brought." *Raleigh,* 2 How. St. Tr. at 24.

The judges nevertheless deemed Cobham's confession reliable enough to be introduced against Raleigh. They emphasized that it was self-inculpatory, *id.* at 14, 19, "voluntary, and not extracted from [him] upon any hopes or promise of Pardon." *Id.* at 29. It also – of particular relevance here – was consistent with portions of Raleigh's pretrial examination and the confessions of other alleged accomplices. *Id.* at 17. The jury convicted Raleigh largely on the basis of Cobham's extrajudicial testimony. Years later, one of his trial judges lamented that the trial "injured and degraded the justice of England"; another remarked that "I hope that we shall never see the like again." Christopher Smith, *Biography of Sir Walter Raleigh*, *in* Britannia Biographies, pt. 15 (1999) <http://www.britannia.com/bios/raleigh/out.html>.

The common law right to confrontation hardened to put an end to this practice. *See Green,* 399 U.S. at 156-57; 1 Samuel R. Gardiner, History of England 138 (1965); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389-90 (1959). By the middle of the seventeenth century, witnesses were required to give their testimony face-to-face, and the accused had the right "to cross-examine the witnesses against him if he thought fit." 1 Stephen, *supra,* at 358. Accordingly, in 1662, the King's Bench ruled unanimously that although a custodial confession was valid "evidence against the party himself who made the confession," it "cannot be made use of as evidence against any others whom on his examination he confessed to be in the [crime]." *Case of Thomas Tong,* Kelyng J., 17, 18, 84 Eng. Rep. 1061-62 (1662). This right to confrontation was a bright-line rule. Even if a witness died, his prior *ex parte* statement to a governmental officer could not be admitted against the accused because the defendant "could not cross-examine" the declarant. *Rex v. Paine,* 90 Eng. Rep. 1062, 1062 (K.B. 1696) (statement to justice of the peace); *see also Eade v. Lingood,* 1 Atk. 203 (1747) (deposition before bankruptcy commissioners).

The writings of Hale and Blackstone confirm that the common law established a categorical rule that incriminating testimony be provided at trial and be subjected to cross-examination. Hale explained that cross-examination "beats and boults out the Truth much better" than *ex parte* examinations with "limited . . . Interrogatories in Writing." Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713). The common law thus provided that "by [the] personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses; . . . and by this Means great Opportunities are gained for the true and clear discovery of the Truth." *Id.*

Blackstone's description of the right to confrontation, which is even more detailed, is similarly absolute in requiring the prosecution to establish its case through live witnesses:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk in the ecclesiastical courts and all others that have borrowed their practice from civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. . . . In short by this method of

> examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.

3 William Blackstone, Commentaries on the Laws of England *373-74 (1768). Witnesses were required to be available for cross-examination, in short, because this procedure was viewed as the "only" acceptable way of taking potentially incriminating testimony. *Id.* at *373. No other method – especially not *ex parte* depositions – was trusted to "sift out the truth." *Id.*

By the time that America's colonization was beginning in earnest, it was "settled doctrine" under the common law system that *ex parte* testimonial statements incriminating criminal defendants were inadmissible because "statements used as testimony must be made where the maker can be subjected to cross-examination." 5 Wigmore on Evidence § 1364, at 26 (Chadbourn rev. 1974). This rule flatly prevented the government from using accomplices' custodial statements against anyone other than themselves.

2. The Confrontation Clause's Codification of the Common Law Rule.

States and the Framers of the Sixth Amendment adopted the common law right to confrontation in order to prohibit abuses such as those in Raleigh's trial from ever coming to roost in the United States. *See United States v. Inadi*, 475 U.S. 387, 411 (Marshall, J., dissenting) ("The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee."); *Mattox v. United States*, 156 U.S. 237, 242 (1895) ("primary

object" of Confrontation Clause is "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness"); Francis H. Heller, The Sixth Amendment 104 (1951) (tracing Clause to reaction to Raleigh's trial). Like the English lawyers and judges before them, Americans understood this right to confrontation as prohibiting a nontestifying accomplice's examination or other *ex parte* testimony from ever being introduced against a criminal defendant.

While defending a client in a criminal case, for instance, John Adams noted that "[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." 2 Legal Papers of John Adams 207 (Wroth & Zobel eds., 1965). The first Continental Congress delivered an address to foreigners detailing "the essential rights of the colonists," stressing that among these rights was the right of people accused of crimes to "'full enquiry, face to face, in open court'" concerning any testimony offered against them. Sources of Our Liberties 284 (Richard L. Perry ed. 1959) (quoting 1 *Journals of the American Congress, 1774-1788* 41-42 (1823)).

Thus, when an Antifederalist leader in the struggle for a bill of rights complained that the proposed constitution omitted "essential rights, which we have justly understood to be the rights of freemen," he quickly mentioned the right to confrontation and characterized it as an absolute procedural right: "Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question." Richard Henry Lee, *Letter IV by The Federal Farmer* (Oct. 15, 1787), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 469, 473 (1971). The author further explained that written testimony, even if given merely for expediency rather than in bad faith, was "almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Id.*

Shortly after the Bill of Rights was adopted, Chief Justice Marshall applied the Confrontation Clause in the trial of Colonel Aaron Burr in a manner that confirmed its prohibition against using *ex parte* testimonial statements to convict criminal defendants. The federal government indicted Burr for plotting to lead an illegal military expedition and sought to introduce declarations "tending to implicate Colonel Burr" that one Blennerhassett gave after the alleged plot was snuffed out. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694). The government argued that even though Blennerhassett was unavailable to testify at trial, his declarations were admissible because they related to a conspiracy and because he and Burr "were accomplices." *Id.* In addition to ruling that the declarations were not admissible as conspiratorial statements because they were not given in furtherance of the alleged wrongdoing and because the government did not allege a conspiracy in any event, Chief Justice Marshall emphatically rejected the government's alternative argument that Blennerhassett's declarations were admissible as accomplice confessions:

> I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know of none, by undermining which, life, liberty, and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.

Id. at 193. Chief Justice Marshall then explained how the Confrontation Clause operated, echoing the King's Bench's decision in *Tong's Case* a century and one-half before:

> [W]here A., B., and C. are indicted for murdering D., . . . the declarations of one of the parties made in the absence of the others have *never* been admitted as evidence against the others.

> . . . .
>
> . . . If, for example, one of several men who had united in committing a murder should have said, that he with the others contemplated the fact which was afterwards committed, I know of *no case* which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken.

Id. at 194-95 (emphasis added). Applying this bright-line rule, Chief Justice Marshall concluded that "the declarations of third persons not forming part of the transaction, and not made in the presence of the accused, cannot be received as evidence in this case." *Id.* at 198. He never inquired into whether Blennerhassett's confession interlocked with any statement Burr had offered or whether it otherwise evinced indications of reliability. The fact that Blennerhassett's declarations were given outside Burr's presence was enough to render them inadmissible.

Contemporary state court decisions applying parallel state provisions confirm that the American right to confrontation, replicating the common law right, was intended to bar the introduction of all incriminating testimony that had not been subjected cross-examination.[2] In *State v. Webb*, 2 N.C. (1 Hayw.) 103 (1794), the first reported decision involving a state confrontation provision, the North Carolina court refused to allow an *ex parte* deposition to be read into evidence against

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[2] Several states adopted bills or declarations of rights prior to the adoption of the federal Constitution, and every one of them explicitly provided for the right to confrontation. *See* Va. Bill of Rights § 8 (1776); Pa. Const. § A(IX) (1776); N.C. Decl. of Rights Art. VII (1776); Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights Art. XIX (1776); Vt. Decl. of Rights Art. X (1777); Mass Const. Art. XII (1780); N.H. Bill of Rights Art. XV (1784). Several early court decisions in other states confirm that they, too, intended to codify the common law right. *See, e.g., Anthony v. State*, 19 Tenn. (Meigs) 265, 277-278 (1838) (state confrontation clause "was not to introduce a new principle" but to preserve a right won in England "after a long contest with the crown"); *Campbell v. State*, 11 Ga. 353, 374 (1852) ("The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law."); *Summons v. Ohio*, 5 Ohio St. 325, 340 (1856) (same).

the accused, explaining that "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.* at 103. A Tennessee court later expressed agreement with *Webb*, and upheld the admission of a deceased witness's prior accusatory testimony under the state confrontation clause only because it had been offered in the defendant's presence where "he had the liberty to cross-examine" the witness. *Johnston v. State*, 10 Tenn. (2 Yer.) 58, 59 (1821). The highest court in South Carolina, moreover, overturned a conviction because the trial court admitted a sworn deposition to a coroner implicating defendant. Brushing aside any suggestion that the "solemnity of the occasion or the weight of the testimony" permitted its admission, the court ruled that "such depositions are *ex parte*, and, therefore, utterly incompetent." *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 1844 WL 2558, at *1 (1844).

When this Court first considered the Confrontation Clause at length, it properly treated the right to confrontation, "in light of the law as it existed at the time it was adopted," *Mattox* 156 U.S. at 243, as a procedural requirement that all testimony offered against the accused be subject to cross-examination. This Court thus endorsed the South Carolina Court of Appeals' decision in *Campbell*, observing that since the testimony there was taken in the absence of the accused, "*of course* it was held to be inadmissible." *Mattox*, 156 U.S. at 241 (emphasis added). In contrast, this Court held in the case before it that the Confrontation Clause permitted the admission of testimony from a prior trial involving the same defendant and the same charge. "The substance of the constitutional protection," this Court explained, "is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244. There is no mention anywhere in the opinion of the admissibility of out-of-court testimony turning on its purported reliability; the sole test was whether it had been subjected to cross-examination, a right that this Court stated defendants

"shall *under no circumstances* be deprived of." *Id.* at 244 (emphasis added).[3]

Other decisions during this period followed the same pattern. *Motes v. United States*, 178 U.S. 458 (1900), much like this case, involved the prosecution's use of an accomplice's "statement in the nature of a confession" that implicated the accused individuals in the charged offense, one of whom also confessed to the crime. *Id.* at 470-72. The accomplice had given his confession at the defendants' preliminary examination and then absconded. At trial, the government offered the accomplice's prior testimony as evidence against the other defendants. On review, this Court held that the admission of this testimony violated the confrontation rights of *all* of the other defendants, including the one who also had confessed. *Id.* at 471. This Court found it unnecessary to inquire whether the accomplice's confession interlocked with the other defendant's or appeared otherwise reliable. Rather, this Court followed an opinion from the Queen's Bench terming it an "absolute" rule that the accused have "a witness for the prosecution against him examined and cross-examined before the jury." *Id.* at 473-74 (quoting *Regina v. Scaife*, 2 Den. C.C. 281, 285 (1851) (Lord Campbell, C.J.)). In another case, this Court likewise applied the unequivocal common law rule that an accomplice's "confession is no evidence against the prisoner" in holding that an accomplice's guilty plea for theft was inadmissible against the accused to prove that the property he received was stolen. *Kirby v. United States*, 174 U.S. 47, 53-60 (1899). Once again, this Court made no reference to any possible exception for interlocking or otherwise reliable confessions.

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[3] In construing the confrontation section of the Philippine Bill of Rights, which is "substantially the provision of the 6th Amendment," this Court similarly explained that the section "intends to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by *only* such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give the accused an opportunity for cross-examination." *Dowdell v. United States*, 221 U.S. 325, 329-30 (1911) (emphasis added).

3. This Court's Modern Jurisprudence.

The results of this Court's modern confrontation decisions accord with the traditional prohibition against admitting any incriminating testimonial statements that have not been subjected to cross-examination.

This Court has found the Confrontation Clause violated each time it has considered a criminal case in which the prosecution introduced a nontestifying accomplice's custodial statement or a nontestifying witness's prior testimony that was not subject to cross-examination. *See Lilly,* 527 U.S. 116 (accomplice's custodial confession); *Idaho v. Wright,* 497 U.S. 805 (1990) (alleged victim's statements to doctor made in apparent coordination with police's investigation of defendant); *Lee v. Illinois,* 476 U.S. 530 (1986) (accomplice's custodial confession); *Berger v. California,* 393 U.S. 314 (1969) (per curiam) (preliminary hearing testimony); *Brookhart v. Janis,* 384 U.S. 1 (1966) (accomplice's custodial confession); *Douglas v. Alabama,* 380 U.S. 415 (1965) (accomplice's custodial confession); *Pointer v. Texas,* 380 U.S. 400 (1965) (testimony at preliminary hearing). In a series of cases beginning with *Bruton v. United States*, 391 U.S. 123 (1968), this Court also has held that in joint trials the Confrontation Clause prohibits the admission of nontestifying accomplices' custodial confessions against even the accomplices themselves when the confession also incriminates the codefendant. *See also Roberts v. Russell*, 392 U.S. 293 (1968) (per curiam); *Cruz v. New York,* 481 U.S. 186 (1987); *Gray v. Maryland,* 523 U.S. 185 (1998). The reason for this rule is that even if a judge instructs jurors to consider such a confession as evidence against only the accomplice, it is too likely that the jurors nevertheless will take it into account in adjudicating the guilt of the codefendant, in violation of the codefendant's right to confrontation. *E.g., Bruton,* 391 U.S. at 135

At the same time, this Court has condoned the use of an unavailable witness's prior testimony against the accused when the witness was subject to cross-examination during the prior testimony. *See Ohio v. Roberts,* 448 U.S. 56 (1980)

(preliminary hearing testimony where witness was subject to "the equivalent of significant cross-examination"); *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (testimony from a prior trial on same charges where witness was subject to "adequate" cross-examination); *Green,* 399 U.S. 149 (preliminary hearing testimony when witness was subjected to "full" cross-examination). This Court also has allowed the prosecution to introduce hearsay statements against defendants when the statements were made under nontestimonial circumstances – that is, when they were made without litigation in mind. *See White,* 502 U.S. 346 (spontaneous declaration and medical-treatment statement by a child); *Bourjaily v. United States,* 483 U.S. 171 (1987) (co-conspirator's statement to another co-conspirator); *United States v. Inadi,* 475 U.S. 387 (1986) (same); *Dutton v. Evans,* 400 U.S. 74 (1970) (same).

The landscape of these decisions, interpreted through the prism of the traditional understanding of the right to confrontation, evokes a straightforward rule: The Confrontation Clause bars the government in criminal cases from introducing "testimony" that is not subject to (and has not previously been subjected to) cross-examination by the defendant. In concrete terms, this rule prohibits the prosecution from introducing *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. *See White,* 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment). The Clause, however, does not apply to hearsay statements made unrelated to any pending or potential prosecution.

B. This Traditional Construction of the Confrontation Clause Dictates that Sylvia's Custodial Examination Was Inadmissible Against Petitioner, Regardless of Whether It Appears To Be "Reliable."

Applying this traditional, testimonial understanding of the Confrontation Clause, the proper result here is clear: Petitioner's confrontation rights were violated because the

State introduced a nontestifying accomplice's custodial examination implicating him in the charged offense. The accomplice gave this out-of-court statement to State officials for reasons related to its anticipated prosecution of Petitioner, but the statement was never subjected to cross-examination. Indeed, the transcript of Sylvia's examination reads just like *ex parte* deposition testimony, *see* J.A. 124-41, the precise kind of evidence the Confrontation Clause is meant to bar from criminal trials. And the State used the extrajudicial statement at trial just like other witness testimony: "The defendant's own wife," the State argued at closing, "gives damning evidence in this case. . . . She describes an intentional stabbing of Mr. Lee and completely refutes his claim of self-defense." Report of Proceedings at 468. The Confrontation Clause simply forbids the use of such untested accusations against criminal defendants. *See Lilly,* 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment) (use of nontestifying accomplice's confession against defendant is a "paradigmatic Confrontation Clause violation"); *Bruton,* 391 U.S. at 138 (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

Two of this Court's "incorporation"-era decisions, in fact, provide particularly forceful support for this result. In *Douglas,* which, like this case, involved the admissibility of a nontestifying accomplice's incriminating statement, this Court unanimously held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." 380 U.S. at 419. Even though the accomplice's confession appeared to be quite self-inculpatory and therefore potentially interlocking with the defendant's, *see id.* at 417 n.3, this Court did not find it necessary to examine whether the confession appeared reliable on this or any other basis. Rather, this Court construed the Confrontation Clause, consistent with the common law, as guaranteeing "the right to cross-examination" and found the Clause violated simply

because the out-of-court testimony had never been so tested. *Id.* at 419. In *Brookhart,* this Court likewise ruled in categorical terms that the defendant's confrontation right was violated because "there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants [who pleaded guilty before trial], who did not testify in court, and [the defendant] was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement." 384 U.S. at 4. The opinion never inquired into the confession's reliability.

The bright-line rule applied in these decisions, combined with the centuries of confrontation jurisprudence, renders irrelevant the Washington Supreme Court's conclusion that Sylvia's custodial statement was "reliable" because it "interlocked" with Petitioner's custodial statement. The right to confrontation is a procedural requirement that the government prove its case through live testimony that is subject to cross-examination. The introduction of Sylvia's *ex parte* custodial examination violated this rule because the State obtained her incriminating statements for use in its anticipated prosecution of Petitioner and Sylvia was unavailable for cross-examination.

C. To the Extent that Reasoning in *Ohio v. Roberts* and Subsequent Cases Permits the Admission of Incriminating Testimonial Statements When Courts Deem Them Reliable, That Methodology Should Be Abandoned.

Although the results of every one of this Court's decisions accords with the traditional rule that the Confrontation Clause prohibits the admission of any incriminating testimonial statement that has not been subjected to cross-examination, some reasoning in this Court's recent confrontation cases admittedly suggests otherwise. In *Ohio v. Roberts,* instead of describing the Confrontation Clause as a bright-line procedural rule, this Court characterized the provision as one concerned with measuring the "trustworthiness" or "reliability" of evidence. 448 U.S. at 65. This Court consequently linked the Confrontation Clause directly to hearsay law and stated that the

Clause permits an extrajudicial statement to be admitted against the accused if the statement (i) falls within a firmly rooted hearsay exception or (ii) has "particularized guarantees of trustworthiness." *Id.* at 66. Although *Roberts* itself involved prior testimony that had been subjected to cross-examination, this Court indicated in subsequent cases involving incriminating testimonial statements that the framework's reliability-based inquiries may still be satisfied without prior cross-examination if the hearsay rule at issue or the "totality of the circumstances" suggest that the statement is sufficiently trustworthy. *See Lee,* 476 U.S. at 543 (accomplice's custodial confession); *Wright,* 497 U.S. at 819-20 (victim's statement to doctor in coordination with police); *Lilly,* 527 U.S. at 124-25 & 144-47 (plurality opinion & opinion of Rehnquist, C.J., concurring in the judgment) (accomplice's custodial confession).

In recent years, however, several Justices of this Court, numerous leading scholars, and the United States, under two different Solicitor Generals, have urged this Court to reconsider the *Roberts* framework with an eye toward reinstating the traditional, testimonial approach to the Clause. *See, e.g., Lilly,* 527 U.S. at 140-43 (Breyer, J., concurring); *White,* 502 U.S. at 366 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); Akhil Reed Amar, The Constitution and Criminal Procedure 129-31 & n.194 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model,* 76 Minn. L. Rev. 559 (1992); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce,* 33 Creighton L. Rev. 763 (2000); Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L. Rev. 1011 (1998); Brief for United States at 17-29, *White v. Illinois,* 502 U.S. 346 (1992) (No. 90-6113); Brief for United States at 12-24, 27-28, 33-36, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580). It should do so now.

This Court has not hesitated to reexamine reasoning that has crept into other areas of its jurisprudence when evidence has emerged indicating that such reasoning lacks constitutional grounding and breeds confusion in the law. In *Sandin v. Conner,* 515 U.S. 472 (1995), for instance, this Court reconsidered a due process methodology that had developed in a line of cases over a sixteen-year period beginning in 1979. Concluding that the methodology had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," this Court abandoned it and "return[ed] to the due process principles we believe were correctly established and applied in [earlier cases]." *Id.* at 483 (1995). In so doing, this Court explained that "[s]uch abandonment . . . does not technically require us to overrule any holding of this Court," but rather "only abandons an approach that in practice is difficult to administer and which produces anomalous results." *Id.* at 483 n.5. In *Collins v. Youngblood,* 497 U.S. 37 (1990), moreover, this Court reexamined the roots of the Ex Post Facto Clause and went so far as to overrule two cases that had "imported confusion into the interpretation of the [Clause]" and that its examination revealed were inconsistent with "the understanding of the term '*ex post facto* law' at the time the Constitution was adopted." *Id.* at 45-47.

The actions in these cases dictate that this Court take a similar step here. The confrontation methodology that this Court coined in *Roberts* and that it has applied in subsequent cases: (1) conflicts with the history, purpose, text, and structure of the Confrontation Clause; and (2) imports unnecessary confusion and inconsistency into the law. Consequently, this Court should abandon the *Roberts* framework and restore the Confrontation Clause's traditional bright-line rule prohibiting the admission of untested testimonial statements that incriminate criminal defendants. This action, as in *Sandin,* would not require this Court to overrule any of its prior decisions, but would merely "abandon[] an approach that in practice is difficult to administer and which produces anomalous results." 515 U.S. at 483 n.5.

1. The *Roberts* Framework Is at Odds With the History, Purpose, Text, and Structure of the Confrontation Clause.

Upon close inspection, the *Roberts* framework, as it has developed and been applied in subsequent cases, contravenes every conventional measure of constitutional law.

History. The development of the common law right to confrontation and all of this Court's decisions applying the Confrontation Clause until very recently center on the procedural requirement that incriminating testimony be subject to cross-examination, not, as the *Roberts* framework does, on the evidentiary question whether statements introduced against defendants are "reliable."

Reliability is a subjective concept that is the touchstone for hearsay law. Yet the right to confrontation developed long before and separately from the concept of hearsay. *See, e.g., Lilly,* 527 U.S. at 140-41 (Breyer, J., concurring). "Hearsay doctrine, like evidentiary law more generally, was not well developed even at the time the [Confrontation Clause] was adopted, much less during the previous centuries." Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. 1171, 1208 (2002). Indeed, as the United States has reported to this Court, "as best as we can determine, not a word was spoken or written – by those who sought the adoption of the bill of rights, by the First Congress, or by state legislatures that ratified the Bill of Rights – to suggest that the confrontation right had anything to do with the general regulation of hearsay or the details of the law of evidence." Brief for United States at 19, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580); *accord* Brief for United States at 21, *White v. Illinois,* 502 U.S. 346 (1992) (No. 90-6113) ("There is no historical basis, however, for regarding the right to confrontation as a general limitation on the admission of hearsay evidence."); *see also White,* 502 U.S. at 362 (Thomas, J., concurring in part and concurring in the judgment) ("There appears to be little if any indication in the historical record"

that the Confrontation Clause was understood as linked to hearsay law).

Contrary to *Roberts'* implication, therefore, "*[a]ccurate* trials was not the driving force behind the Confrontation Clause and related provisions. . . . [T]he Sixth Amendment guaranteed an *adversarial* trial by constitutionalizing a number of interdependent rights so the accused could present a defense and challenge the government's case. Defense cross-examination is crucial to this scheme, and confrontation sought to preserve defense opportunities for exercising *that right.*" Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History,* 27 Rutgers L.J. 77, 168 (1995) (emphasis added). The process of cross-examination, in other words, was guaranteed in and of itself; it was not understood to ebb and flow depending on the perceived reliability of extrajudicial testimony offered in any particular case. *See White,* 502 U.S. at 363 (Thomas, J., concurring in part and concurring in the judgment) ("Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable."); *Summons v. State,* 5 Ohio St. 325, 325 (1856) (right to confrontation "has reference to the *personal presence* of the witnesses called to testify, and not to the *quality* or *competency* of the evidence to be given").

Indeed, as several scholars have pointed out, "neither in the [historical] statutes, caselaw, nor commentary was there a suggestion that, if courts determined that a particular item of type of testimony was reliable, then the accused lost his right to confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken." Friedman & McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. at 1208; *see also* Amar, *supra,* at 125-26, 130 (purpose of Clause was to codify bright-line rule requiring cross-examination of testimony, not to institute a balancing test); Berger, 76 Minn. L. Rev. at 559, 572 (The Court's "insistence that the sole function of the Confrontation Clause is to promote accurate fact-finding ignores the historical

background against which the Clause was drafted and overlooks the context in which it is placed." Complaints that led to creation of the right to confrontation "have less of an evidentiary than a procedural flavor."); Heller, *supra,* at 104-05 (Confrontation Clause is meant to prevent abuses of trial-by-affidavit and secures an "unequivocal" right to cross-examination). As a procedural mechanism, in other words, the Framers intended the right to confrontation to be applied in an unwavering manner to all witness testimony, not as an evidentiary evaluator to be invoked on a case-by-case basis depending upon judges' views of testimony's reliability.

Reliability, to be sure, is among the hallmarks of the adversarial process that the Confrontation Clause requires, but the Clause's history makes clear that it "does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence." *Maryland v. Craig,* 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). Blackstone's description of the right to confrontation as requiring the prosecution to prove its case through in-court testimony before the defendant, the judge, and an observant jury emphasizes that such live testimony "clear[s] up the truth" in a manner that can "never" be assured through the use of prior declarations created on an *ex parte* basis. Blackstone, *supra,* at *373-74. This explains why Raleigh's trial came to be viewed as notorious even though the judges – in reasoning foreshadowing the trial court's and the Washington Supreme Court's logic in this case – found that Lord Cobham's confession appeared reliable in that it was self-inculpatory, voluntarily given, and corroborated by others' confessions. *See supra* at 14. Using the *Roberts* framework now to admit a nontestifying accomplice's confession on such bases utilizes a methodology tantamount to the one that ignited the march toward the Confrontation Clause several hundred years ago.

Purpose. The *Roberts* framework also wanders from the traditional purposes of the Confrontation Clause – namely, to prevent defendants from being convicted on the basis of untested accusations and to govern the method by which the

government presents testimony in criminal cases. "Viewed in light of [these] traditional purposes," as Justice Breyer has suggested, "the [*Roberts*] hearsay-based Confrontation Clause test . . . is both too narrow and too broad." *Lilly,* 527 U.S. at 141 (Breyer, J., concurring).

The *Roberts* framework is too narrow insofar as it authorizes the admission of *ex parte* statements "prepared as testimony for trial when such statements happen to fall within some well-recognized hearsay exception" or a court determines that they otherwise appear reliable. *Id.* The Framers of the Confrontation Clause believed that the *only way* to ensure that testimony was dependable enough to support a criminal conviction was to subject it to cross-examination. But while the *Roberts* framework respects cross-examination's usefulness in "mak[ing] it more difficult to lie against someone," *Roberts,* 448 U.S. at 63 n.6 (quotation omitted), or guaranteeing "the declarant's truthfulness," *Wright,* 497 U.S. at 820, it overlooks the fact that this is not the only – or even the primary – purpose of cross-examination. The process of face-to-face testimony subject to cross-examination also traditionally has been considered an indispensable method of enhancing the accuracy and thoroughness of the testimony of even perfectly honest witnesses. And it was this purpose that drove the Framers to incorporate the Confrontation Clause into the Constitution.

At common law, "the opinion of the time seems to have been that if a man came and swore to anything whatever, he ought to be believed unless he was directly contradicted." 1 Stephen, *supra,* at 399-400; *accord Benson v. United States,* 146 U.S. 325, 336 (1892). Blackstone thus endorsed cross-examination not as a means of exposing liars but of preventing the government from "dressing up" a witnesses' testimony without allowing him, upon questioning by the defendant, "to correct and explain his meaning, if misunderstood." 3 Blackstone, *supra,* at *373. In addition, because witnesses whose recollections are faulty may not realize them as such until searching questions from the defendant cause the witnesses to reexamine their perceptions, another leading

expositor of the English common law explained that cross-examination

> constitutes a strong test both of the *ability* and the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized.

Thomas Starkie, A Practical Treatise of the Law of Evidence 34 (4th ed. 1853) (emphasis added). American lawyers and judges at Founding likewise placed great faith in oaths and generally assumed that witnesses, whether making declarations in court or signing *ex parte* affidavits, would try to be honest. *See* Amar, *supra,* at 129.[4] Cross-examination was used "to correct any misconception of facts, to elicit truth, and justify the severe retribution awarded in cases of clear guilt." *Campbell,* 30 S.C.L. 124, 1844 WL 2558, at *2.

The right to confrontation, therefore, was not meant so much to smoke out lying witnesses as it was intended to prevent the government from using testimony from a witness who, in perfectly good faith, offered only some of the pertinent facts (often because the government asked only certain questions) or relayed mistaken impressions of often complicated or stressful events. *See* Amar, *supra,* at 125; Berger, 76 Minn. L. Rev. at 573-74. Prior to *Roberts*, in fact, this Court recognized that cross-examination ensured the accuracy of testimony given even under seemingly dependable circumstances, observing that confrontation operates "particularly to preserve the right of the accused to test the recollection of the witness in the exercise of cross-examination." *Dowdell,* 221 U.S. at 330; *see also Mattox,* 156

[4] The Constitution itself relies on oaths in several key passages. *See* U.S. Const. art. I, § 3, cl. 3 (requiring "oath or affirmation" when Senate sits in impeachment trial); *id.* art VI, cl. 3 (requiring various officers and legislators to take "oath or affirmation" to support the Constitution); *id.* amend. IV (requiring "oath or affirmation" for search or seizure warrant); *id.* amend. XIV, § 3 (disqualifying Confederate oath breakers).

U.S. at 242 (cross-examination allows defendant to "test[] the recollection and sift[] the conscience of the witness"). Indeed, the *Roberts* Court itself found the prior testimony at issue to be sufficiently reliable for confrontation purposes only because the testimony had been subjected to cross-examination. 448 U.S. at 73; *see also Mancusi,* 408 U.S. at 216 (same). The suggestions after *Roberts*, however, in *Lee, Wright,* and *Lilly* that testimony might be reliable enough for confrontation purposes in the absence of cross-examination overlook this additional truth-seeking purpose of cross-examination and misconceive the right to confrontation. This Court was correct in *Mattox* when it said that the right to "cross-examination," not any entitlement to reliable evidence, was the right that the Confrontation Clause guarantees that defendants "shall under no circumstances be deprived of." 156 U.S. at 244.

The *Roberts* framework, at the same time, is too broad insofar as it "make[s] a constitutional issue out of the admission of *any* relevant hearsay statement, even if that hearsay statement . . . was made long before the crime occurred and without relation to the prospect of a future trial." *Lilly,* 527 U.S. at 142 (Breyer, J., concurring). This requires every hearsay exception in every jurisdiction across the country that is applied in a criminal case to obtain the blessing of the Confrontation Clause. If nontestimonial hearsay evidence does not fall within a "firmly rooted" exception and a court finds that it does not evince sufficient indicia of reliability, the court must exclude it. Although this Court thus far has not invoked *Roberts* to exclude any such evidence, *see supra* at 23, fairly applying its framework in other cases unquestionably bans the introduction of some otherwise acceptable hearsay evidence, such as some business records or one friend's note to another. *See, e.g., Lilly,* 527 U.S. at 142 (Breyer, J., concurring); *United States v. Ordonez,* 737 F.2d 793, 802 (9th Cir. 1984) (invoking *Roberts* to bar admission of business ledger entries).

Such nontestimonial evidence, however, does not resemble the abusive *ex parte* examinations that the crown used in sixteenth century England or implicate any of the core

concerns of the Confrontation Clause. It is not created for prosecutorial authorities' use in investigating or prosecuting crime. Nor is it typically subject to molding by interested parties who may wish to lead the speaker in a certain direction or to discuss only certain aspects of an episode. And, unlike pretrial depositions or custodial examinations, nontestimonial hearsay does come to a jury as a second-best means (compared to trial testimony) of capturing and relaying a person's impressions and recollections. To the contrary, out-of-court statements made unconnected to any litigation tend to have an authenticity and probative value that "cannot be replicated even if the declarant testifies to the same matters in court." *Inadi,* 475 U.S. at 395 (describing co-conspirator statements); *see also White,* 502 U.S. at 356 (spontaneous utterances and statements for medial care have a "reliability [that] cannot be recaptured even by later in-court testimony").

Abandoning the *Roberts* framework would terminate the Confrontation Clause's unnecessary and potentially mischievous oversight of this sphere of ordinary hearsay law – a function that the Clause was never meant to perform.[5]

Text. Prohibiting the government from introducing *ex parte* testimonial statements, including accomplices' custodial examinations, against criminal defendants also accords with the text of the Confrontation Clause. The ordinary meaning of the Confrontation Clause, which states that the accused "shall have the right" to confrontation, U.S. Const. amend. VI, guarantees

[5] To the extent that this Court might be concerned about removing constitutional oversight entirely from the development and application of nontestimonial hearsay law, *cf. White,* 502 U.S. at 352, the Due Process Clause can carry out that role. As this Court stated in *Green,* "we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking." 399 U.S. at 163 n.15. Indeed, the Due Process Clause was already serving this role until *Roberts* effectively reassigned the job to the Sixth Amendment. *See Manson v. Brathwaite,* 432 U.S. 98, 106 (1977) (Due Process Clause forbids testimony that lacks "sufficient aspects of reliability" to be intelligently evaluated by the jury); *United States v. Shoupe,* 548 F.2d 636, 643-44 (6th Cir. 1977) (holding that disavowed, unsworn, and uncorroborated hearsay statement was insufficiently reliable to satisfy due process).

defendants an *unconditional* right to challenge the testimony of witnesses against him. There is no mention of reliability or accurate fact-finding. There are no qualifications or exceptions. *See White,* 502 U.S. at 363 (Thomas, J., concurring in part and concurring in the judgment) ("the Clause makes no distinction based on the reliability of the evidence presented"). But the *Roberts* framework rewrites the Clause to enforce the right to confrontation only if proffered testimony appears unreliable. Like the hearsay law it references, the framework makes exceptions as common as the rule.

The absence, however, of any such actual qualifications in the language of the Confrontation Clause is telling. Unlike situations in which a procedure or technology that was unknown to the Framers develops and this Court must hypothesize regarding how the Constitution is meant to apply under new circumstances, *see, e.g., Kyllo v. United States,* 533 U.S. 27 (2001), the Framers, as noted above, were keenly aware of possibility of using nontestifying accomplices' confessions and other untested extrajudicial testimony against criminal defendants. That they did not provide any potential exceptions to the prohibition against the use of such testimony is a forceful signal that the Confrontation Clause categorically prohibits the admission of any such untested statement, whether courts deem it reliable or not. This signal is especially telling when one puts the language of the Confrontation Clause side-by-side with value-laden provisions such as the Fourth Amendment (which prohibits "unreasonable" searches) and the Eighth Amendment (which prohibits "cruel and unusual" punishment). The unqualified language of the Confrontation Clause shows that it establishes a bright-line rule of procedure, not a malleable standard of admissibility.

The *Roberts* framework, moreover, fails to give proper meaning to the Clause's phrase "witnesses against." A person is a "witness against" another – in 1791 as today – only if that person "gives testimony" or testifies "[i]n judicial proceedings . . . for the purpose of establishing or making proof of some fact to a court." 2 Noah Webster, An American Dictionary of

the English Language (1828), *quoted in Craig,* 497 U.S. at 864 (Scalia, J., dissenting). But the *Roberts* framework transforms the words "witness against" into any "hearsay declarant [who] is not present for cross-examination," *Roberts,* 448 U.S. at 57, a definition that includes speakers of everyday utterances such as spontaneous declarations to their friends or their doctors, as well as authors of family or business records. This vast enlargement of the reach of the Clause beyond courtroom witnesses and persons whose testimony is offered through custodial examinations, affidavits, and similar materials, contravenes the ordinary meaning of the word "witness," which refers to those whose *testimony* is used against the defendant at trial, not to all hearsay declarants.

Structure. The *Roberts* framework also is at odds with several established constitutional rules of criminal procedure. As an initial matter, it has long been an unquestioned rule in the federal circuit courts that the Confrontation Clause requires trial judges to strike the testimony of any prosecution witness who invokes a privilege in order to avoid cross-examination on matters directly related to his direct testimony.[6] In such situations, the pivotal question is whether the witness's sudden unavailability "precludes inquiry into the details of his direct testimony" or merely concerns a collateral issue. *United States v. Cardillo,* 316 F.2d 606, 611 (2d Cir. 1963). But under the *Roberts* framework, even if the witness directly implicated the defendant in the crime and refused to answer a single question on cross-examination, his testimony would still be admissible if the judge deemed it reliable – a conclusion that the judge could well reach in light of the respect ordinarily given to trial testimony. The obvious unfairness of such a result – and its

[6] *See, e.g., United States v. Brooks*, 82 F.3d 50, 54-55 (2d. Cir. 1996); *United States v. Berrio-Londono*, 946 F.2d 158, 160-61 (1st Cir. 1991); *United States v. Zapeta*, 871 F.2d 616 623-24 (7th Cir. 1989); *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983); *United States v. Humphrey*, 696 F.2d 72, 75 (8th Cir. 1982); *United States v. LaRiche*, 549 F.2d 1088, 1096-97 (6th Cir. 1977); *United States v. Newman*, 490 F.2d 139, 145 (3d Cir. 1974); *United States v. Ginn*, 455 F.2d 980, 980 (5th Cir. 1972); *United States v. Norman*, 402 F.2d 73, 76-77 (9th Cir. 1968); *United States v. Smith*, 342 F.2d 525, 526 (4th Cir. 1965).

stark incompatibility with the structure of the Sixth Amendment – calls the *Roberts* framework into serious doubt.

Furthermore, although the same word should mean the same thing in different constitutional provisions, *see, e.g., United States v. Kozminski,* 487 U.S. 931, 945 (1988); *Kosydar v. National Cash Register Co.,* 417 U.S. 62, 67 n.5 (1974), and various constitutional provisions with similar objectives should compliment each other, the *Roberts* framework's enlargement of the scope of the Confrontation Clause is inconsistent with other constitutional provisions that concern adverse witnesses in criminal cases. The *Roberts* framework, for instance, posits that any speaker of any hearsay evidence offered against the accused constitutes a "witness" under the Confrontation Clause, but surely the government could not satisfy the Treason Clause – which requires "the Testimony of two Witnesses" to convict a defendant of treason, U.S. Const. Art. III, § 3, cl. 1 – by producing one live witness to say he saw the defendant commit the defense and that his brother also told him that the defendant broke the law. *See* Amar, *supra,* at 128 (elaborating on this point). Rather, the Treason Clause plainly requires two witnesses to give testimony against the defendant in connection with the government's prosecution.

Treating the Confrontation Clause as a procedural, rather than an evidentiary, rule also accords with the rule regarding witness testimony in the Fifth Amendment's Self-Incrimination Clause. That Clause, which prohibits compelling a person "to be a *witness* against himself" in a criminal case, U.S. Const. amend. V (emphasis added), bars the government from compelling in-court testimony as well as out-of-court confessions. And if the government obtains an out-of-court confession in violation of this procedural guarantee, the Clause bars it from introducing that statement in its case-in-chief at trial, regardless of whether it interlocks with others' confessions or appears somehow reliable. *See, e.g., Oregon v. Elstad,* 470 U.S. 298, 306 (1985). Abandoning the *Roberts* framework would bring the Confrontation Clause back in line with this related constitutional safeguard.

2. The *Roberts* Framework Breeds Inconsistent and Anomalous Results.

Because issues regarding the permissibility of introducing of out-of-court statements against criminal defendants arise frequently, this Court in *Roberts* correctly observed that trial courts and litigators need "certainty and consistency in the application of the Confrontation Clause." 448 U.S. at 73 n.12. The *Roberts* reliability-based framework accordingly was designed to "respond[] to the need for certainty in the workaday world of conducting criminal trials." 448 U.S. at 66.

Yet the framework in practice has provided anything but. Instead of treating the Confrontation Clause as a bright-line rule requiring testimonial statements open to cross-examination (but that does not apply to ordinary hearsay), *Roberts'* conception of the Clause "makes easy cases hard," requiring "courts [to] treat [the Clause] as a complex, amorphous, and technical expression of principles that are baffling even to lawyers." Friedman & McCormack, 150 U. Pa. L. Rev. at 1228. The inevitable result is that applications of the Confrontation Clause have become inconsistent and confusing, and they often generate anomalous results, admitting *ex parte* testimony (such as the accomplice's custodial examination here) that lies at the core of what the Clause is designed to prohibit.

Courts applying the *Roberts* framework regularly reach opposite conclusions concerning reliability in cases with the same facts.[7] They also often reach the same conclusions in cases with opposite facts.[8] The "particularized guarantees of

[7] *Compare, e.g., United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000) (accomplice confession unreliable in part because DEA agent told accomplice that "he could help himself by cooperating with the agents") *with State v. Marshall,* 737 N.E.2d 1005, 1009 (Ohio App. 2000) (accomplice confession reliable even though the police told him that they "may be able to cut him some slack if he confessed").

[8] *Compare, e.g., State v. Franco*, 950 P.2d 348, 353 (Or. App. 1999) (accomplice confession reliable because it was given in response to a "basic, non-leading question") *with People v. Jordan,* 2002 WL 50594, at *5 (Cal. App. 2002) (accomplice confession reliable even though police investigator "primarily used leading questions").

reliability" test, in fact, leaves courts so much case-by-case discretion they have been liable to find that almost anything evinces reliability, generating puzzling situations in which someone trying to understand the law learns that both *fact x* and *fact not x* support admitting incriminating testimonial statements.[9]

A nonexhaustive list of typical factors courts invoke to allow the admission of testimonial materials against defendants includes: (1) the declarant was not under arrest when he gave the statement, *People v. Schutte*, 613 N.W.2d 370, 376 (Mich. 2000); (2) the declarant's statement was against his penal interest, *Holiday v. State,* 14 S.W.3d 784, 786-87 (Tex. App. 2000); (3) the statement was voluntary, *People v. Thomas*, 730 N.E.2d 618, 626 (Ill. App. 2000); (4) the declarant exhibited no signs of mental instability, *Stevens*, 29 P.3d at 318; (5) the declarant's "demeanor during the interview" was consistent with truthfulness, *Bintz*, 650 N.W.2d at 918; (6) the statement was given "during normal [business] hours," *Jordan,* 2002 WL 50594, at *5; (7) the declarant was not under the influence of any chemical substance when he gave his statement, *id.*; (8) the declarant was accompanied by his attorney, *People v. Campbell*, 721 N.E.2d at 1225, 1230 (Ill. App. 1999); (9) the declarant implicated a good friend in his statement, *id.*; (10) the statement was given shortly after the events at issue, *Farrell,* 34 P.3d at 407; (11) the declarant was not agitated when he implicated the defendant, *id.* at 407-08; (12) the declarant did

[9] *Compare, e.g., People v. Farrell,* 34 P.3d 401, 407 (Colo. 2001) (accomplice confession reliable because it was given "immediately after" the events at issue) *with Stevens v. People*, 29 P.3d 305, 316 (Colo. 2001) (accomplice confession reliable in part because "two years had passed since the murder"), *cert. denied,* 535 U.S. 975 (2002); *Farrell*, 34 P.3d at 407 (accomplice confession reliable because the portion inculpating others was "highly detailed") *with United States v. Photogrammetric Data Servs., Inc.,* 259 F.3d 229 (4th Cir. 2001) (statement to police reliable because the portion inculpating others was "fleeting"), *cert. denied,* 535 U.S. 926 (2002); *Nowlin v. Commonwealth,* 579 S.E.2d 367, 372 (Va. App. 2003) (custodial statement reliable because the declarant had been explicitly charged with a crime and advised of her *Miranda* rights) *with State v. Bintz,* 650 N.W.2d 913, 918 (Wis. App.) (custodial statement reliable because the declarant was not told that he was under any suspicion), *rev. denied,* 653 N.W.2d 891 (Wis. 2002).

not mention any animosity toward the defendant, *Gabow v. Commonwealth,* 34 S.W.3d 63, 78 (Ky. 2000); (13) the declarant implicated the defendant "inferentially" instead of "directly," *id.* at 79; (14) the declarant was placed under oath, *United States v. Dolah,* 245 F.3d 98, 105 (2d Cir. 2001); (15) the declarant's statement was consistent with other witnesses' trial testimony, *United States v. Thomas,* 2002 WL 429383, at *1 (4th Cir.), *cert. denied,* 535 U.S. 1066 (2002); (16) the declarant's statement was given from personal knowledge, *id.*; (17) the declarant knew the defendant and his associates were dangerous, *Stevens,* 29 P.3d at 316; (18) the declarant was in custody on charges unrelated to those against the defendant when he gave his statement, *id.*; (19) the declarant's statement was "given in a formal proceeding," *United States v. Papajohn,* 212 F.3d 1112, 1120 (8th Cir. 2000); and, of course, (20) the declarant's statement "interlocked" with the defendant's custodial statement, J.A. 15-16.

Every single one of these factors could have been present under the English *ex parte* affidavit system that the right to confrontation intended to abolish. Indeed, at least half of them were present in Raleigh's prosecution.[10] Many of the factors are so common or imprecise as to be almost meaningless.

Thus, although the *Lilly* plurality stated that "[i]t is *highly unlikely* that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be

[10] England's attorney general and the judges in Raleigh's case noted that Lord Cobham's custodial examination was dependable because: (1) "he would not turn the weapon against his own bosom, and accuse himself to accuse [Raleigh], *Raleigh,* 2 How. St. Tr. at 14 – in other words, because it was against Cobham's penal interest; (2) the confession was not given "in passion" or out of malice against Raleigh, *id.* at 14; (3) Cobham's demeanor was consistent with truthfulness, *id.*; (4) Raleigh was an "old friend" of Cobham's, *id.* at 18; (5) Cobham's confession was "voluntary," *id.* at 29; (6) the confession "was not extracted from lord Cobham upon any hopes or promise of Pardon," *id.*; and (7) Cobham's confession was consistent with the examinations of other alleged co-conspirators, *id.* at 17. It also is apparent Cobham was not under the influence; that his custodial examination was given from his personal knowledge, *see* Gardiner, *supra,* at 116-20; and that it was offered in a formal proceeding before the Privy Council. *See* 1 Stephen, *supra,* at 333.

effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice," 527 U.S. at 137 (emphasis added), it is perhaps unsurprising that courts in fact deem such statements reliable quite frequently. A recent study of seventy post-*Lilly* appellate decisions involving accomplices' custodial statements that shift or spread blame to the defendant found that courts in twenty-five of those cases (over 35%) deemed the statements sufficiently reliable to satisfy the Confrontation Clause. Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 Syr. L. Rev. 87, 104-05, 112-38 (2003); *see also* Pet. for Cert. at 17-18 (collecting decisions along these lines). Courts reached these results even when the declarant claimed that he served only as the "lookout" while the defendant committed a murder, *Marshall,* 737 N.E.2d at 1009; when the declarant claimed that he waited around the corner while the defendant shot two victims, *Taylor v. Commonwealth,* 63 S.W.3d 151, 166-67 (Ky. 2001) & *Taylor v. Commonwealth,* 821 S.W.2d 72, 74 (Ky. 1990); and when the declarant denied any involvement in the killing at issue and, just as in *Lilly*, told an interrogating police officer that his brother did it. *State v. Murillo,* 623 N.W.2d 187, 188-89, 191-94 (Wis. App. 2001).

The *Roberts* framework also allows courts to admit other types of statements at the heart of the "evil to which the [Confrontation Clause] was directed." *White,* 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment). One federal court of appeals "regularly" allows the admission of nontestifying accomplices' plea allocutions against other defendants. *Dolah,* 245 F.3d at 105; *but see Garrison v. State*, 726 So.2d 1144, 1148 (Miss. 1998). Two other federal courts of appeals, applying *Roberts* and *Lilly,* have held that a nontestifying witness's grand jury testimony that inculpates a defendant is admissible against him at trial when it satisfies "the equivalent circumstantial guarantees of trustworthiness" test under Federal Rule of Evidence 807. *Papajohn,* 212 F.3d at 1116-20; *accord Thomas,* 2002 WL

429383, at *1-2. Another court has held that a nontestifying witness's preliminary hearing testimony may be offered at trial against defendants who did not have an opportunity to cross-examine the witnesses. *See Bintz,* 650 N.W.2d at 918-20. Without mentioning this Court's decisions in *Pointer*, *Berger*, or *Motes*, each of which held that the Confrontation Clause was violated by the admission of untested preliminary hearing testimony, the court went straight to the *Roberts* framework and held that "prior testimony . . . falls under a firmly rooted hearsay exception." *Bintz,* 650 N.W.2d at 920.

Enough is enough. The *Roberts* framework is incapable of bringing consistency or coherence to the Confrontation Clause. It also subverts the integrity of the Clause by permitting the use of statements that flout the history, purpose, text, and structure of the provision. This Court should take this opportunity to restore the Confrontation Clause to a bright-line rule that requires that all testimonial statements offered against criminal defendants be subject to cross-examination. Such a holding would bring order and respect back to this important constitutional provision and return it to the straightforward procedural role it served for hundreds of years before *Roberts.* It also would terminate the Confrontation Clause's improper meddling with ordinary hearsay law.

II. Even If the Perceived Reliability of Sylvia's Statement Did Affect Its Admissibility, Its Introduction Still Violated the Confrontation Clause Because Its Interlocking Nature Does Not Establish That It Has "Particularized Guarantees of Trustworthiness."

Even if this Court decides to apply the *Roberts* framework to this case, it should still reverse the judgment of the Washington Supreme Court. That Court held that Sylvia's custodial statement is "reliable," and hence admissible, because it "interlocks" with Petitioner's custodial statement. J.A. 2. But this Court's precedent dictates that the interlocking nature of an accomplices' confession is irrelevant to whether that statement has the reliability, or the "particularized guarantees of trustworthiness," *Roberts,* 448 U.S. at 66, necessary to allow

its admission over a Confrontation Clause objection. And even if interlocking evidence were relevant to the particularized guarantees inquiry, the totality of the circumstances surrounding Sylvia's statement still demonstrate that it is not sufficiently reliable to satisfy the Confrontation Clause.

A. Whether an Accomplice's Custodial Statement Interlocks with the Defendant's Is Irrelevant to the Particularized Guarantees Inquiry.

The *Roberts* framework's "particularized guarantees of trustworthiness" test permits a hearsay statement to be used against the accused only when "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Wright,* 497 U.S. at 820. This Court's two most recent decisions applying that test make it clear that the interlocking nature of an accomplice's custodial statement is irrelevant to this test.

In *Wright,* the prosecution contended that extrajudicial statements of a child declarant had "particularized guarantees" in part because they were corroborated by other evidence at trial. This Court squarely rejected that argument, holding that "we think the relevant circumstances [to the particularized guarantees inquiry] include *only those that surround the making of the statement* and that render the declarant particularly worthy of belief." *Id.* at 819 (emphasis added); *see also id.* at 826 (corroborating evidence is "irrelevant"). "To be admissible under the Confrontation Clause," this Court continued, "hearsay evidence used to convict a criminal defendant must possess indicia of reliability by virtue of its inherent trustworthiness, *not by reference to other evidence at trial.*" *Id.* at 822 (emphasis added).

The prosecution, put another way by the *Wright* opinion, may not "bootstrap" on other evidence to introduce an incriminating hearsay statement that the Confrontation Clause otherwise deems inadmissible. *Id.* at 823. And lest there be any doubt that this anti-bootstrapping rule applies across the board, this Court explicitly dispelled the suggestion that passages in *Cruz* and *Lee* made the "interlocking nature" of

accomplices' confessions relevant to whether they are admissible against criminal defendants. *Cruz* "said nothing" to suggest that such a circumstance was relevant, this Court explained, and the *Lee* Court "rejected the 'interlock' theory in that case." *Wright,* 497 U.S. at 823-24 & n.*.

The plurality opinion in *Lilly* confirms that *Wright* prohibits any reference to any kind of interlocking evidence in assessing a statement's admissibility under the Confrontation Clause. In *Lilly,* the Virginia Supreme Court held that a nontestifying accomplice's confession was reliable in part because of "the correspondence between [the accomplice's] account and the accounts of other persons acquired by law enforcement authorities" and because it was corroborated by another accomplice's trial testimony. *Lilly v. Commonwealth,* 499 S.E.2d 522, 534 (Va. 1998). A four-justice plurality of this Court, applying *Wright*, squarely rejected this basis of establishing reliability, holding that the fact "[t]hat other evidence at trial corroborated portions of [the accomplice's] statements is irrelevant." *Lilly v. Virginia,* 527 U.S. at 137 (plurality opinion). (This plurality opinion constitutes the holding of the Court on this point under the "narrowest grounds" rule of *Marks v. United States,* 430 U.S. 188, 193 (1977), because Justices Scalia and Thomas each concurred on the basis that the Confrontation Clause prohibits the introduction of all nontestifying accomplices' custodial statements, regardless of the statements' reliability.) If evidence that an accomplice's statement is corroborated by other accomplices' statements is irrelevant to the particularized guarantees inquiry, evidence that an accomplice's statement is corroborated by the defendants' statement must also be irrelevant.

This Court's anti-bootstrapping principle, in fact, applies with special force to accomplices' custodial statements that interlock with defendants' statements. In *Wright,* this Court stated that when circumstances indicate that "the declarant is particularly *un*likely to be telling the truth, . . . the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at

trial" because cross-examination "would be *highly useful* to probe the declarant's state of mind when he made the statements." *Wright,* 497 U.S. at 822-23 (second emphasis added). The scenario of interlocking custodial statements presents just such a situation. Accomplices' custodial statements that shift or spread blame (as Sylvia's statement does) are "presumptively unreliable" because such persons are inherently motivated to divert police scrutiny away from themselves. *Lee,* 476 U.S. at 541; *see also Lilly,* 527 U.S. at 131 (plurality opinion) ("inherently unreliable"); *id.* at 146 (Rehnquist, C.J., concurring in the judgment) (portions that incriminate defendant viewed with "special suspicion"); *Bruton,* 391 U.S. at 136 ("inevitably suspect"). Any similarity between suspected accomplices' custodial statements and the defendant's statements cannot serve as a proxy for the Confrontation Clause's demand that testimony be given under circumstances that ensure that the whole truth will emerge.

Finally, applying *Wright*'s anti-bootstrapping rule to interlocking custodial statements accords with the method by which hearsay law assesses the reliability of out-of-court statements, which the *Roberts* framework, in turn, assimilates into the Confrontation Clause. *See Wright,* 497 U.S. at 820. The traditionally recognized exceptions to the hearsay rule are designed to allow the introduction of statements given under circumstances that operate as "a practicable substitute for the ordinary test of cross-examination, . . . if not quite equivalent" to that test. 5 Wigmore, *supra,* § 1422. Consequently, "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Wright,* 497 U.S. at 820 (quotation omitted). In addition, the declaration sought to be admitted "must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor." 5 Wigmore, *supra,* § 1420 (quoting *Sugden v. St. Leonards,* 1 P.D. 154, 240 (1876)).

The interlocking confession rationale violates both of these requirements. First, it purports to find a hearsay statement reliable by using hindsight, *e.g.*, a *post hoc* comparison between the substance of the statement and another person's statement. Second, the interlocking confession rationale, by definition, concerns extrajudicial statements made to authorities on account of an existing dispute and upcoming criminal prosecution, potentially aimed at the declarant. Under these circumstances, both the declarant and the prosecutorial authorities have obvious motivations to color the past events at issue in ways that will serve them in the future. *See Lee,* 476 U.S. at 541 (accomplices giving custodial confessions have "a strong motivation to implicate the defendant and to exonerate [themselves]") (quotation omitted); *Bruton,* 391 U.S. at 136 (same); Brief for United States at 23-24, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580) (discussing parties' interests when recording *ex parte* testimony, such as accomplice confessions). This inherent risk of distortion is so great that one simply cannot say that the interlocking nature of such a statement may later indicate that it is "free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." Wigmore, *supra,* § 1420, *quoted in Wright,* 497 U.S. at 819.

B. Even if Evidence of Interlock Were Relevant to the Particularized Guarantees Inquiry, the Totality of the Circumstances Surrounding Sylvia's Statement Still Demonstrate That It Is Not Sufficiently Reliable To Satisfy the Confrontation Clause.

The Washington Supreme Court did not simply hold that the interlocking nature of Sylvia's custodial statement suggested that it was reliable; it ruled that this fact alone automatically "satisfie[d] the requirement of reliability under the confrontation clause." J.A. 19 (emphasis removed). The Court thus deemed it irrelevant that the Washington Court of Appeals had listed several other circumstances indicating that Sylvia's statement was unreliable.

This treatment of the interlocking nature of the statements as a reliability trump card squarely conflicts with this Court's precedent. In *Wright,* this Court held in no uncertain terms that "the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from *the totality of the circumstances* that surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 820 (emphasis added). Accordingly, even if evidence of "interlock" is somehow a relevant circumstance "surround[ing] the making of the statement," *id.,* one must also consider other such circumstances in assessing whether the statement is sufficiently reliable to satisfy the Confrontation Clause.[11]

When the totality of the circumstances surrounding Sylvia's statement are considered, it becomes clear that the statement is *not* so trustworthy and comprehensive that cross-examination would have been of marginal utility. First and foremost, it bears repeating that Sylvia made the statement at issue to prosecutorial authorities at a police department while in custody for suspected involvement in a felony. The police told her that it "depend[ed] how the investigation continue[d]" as to whether she would be "detained more at this point or not." J.A. 81. Portions of Sylvia's resulting responses to police questioning related exclusively to Petitioner's actions

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[11] This Court's decision in *Cruz v. New York,* 481 U.S. 186 (1987), also demonstrates even if evidence of interlock is relevant, other factors must bear on the reliability of accomplices' custodial statements. The question presented in that case was whether a nontestifying codefendant's confession incriminating the defendant, where it "is not directly admissible against the defendant," may be introduced at a joint trial when it "interlocks" with the defendant's custodial statement – a question this Court answered in the negative. 481 U.S. at 188-93. If accomplices' confessions were automatically admissible against defendants whenever they interlock with defendants' custodial statements, then the issue in *Cruz* – which assumed that the interlocking confession was not admissible against the defendant – would have been nonsensical. The premise that accomplices' interlocking confessions can be inadmissible against defendants and this Court's ruling that the interlocking confession in that case was, in fact, inadmissible, *id.* at 193-94, confirm that the Confrontation Clause, at a minimum, requires courts to consider factors beyond interlocking evidence. *See Wright,* 497 U.S. at 823 n.* (discussing *Cruz*).

and placed responsibility for the alleged assault on his shoulders. And Sylvia was never cross-examined in any manner by any representative of Petitioner.

These facts alone require that Sylvia's statement be viewed with "special suspicion," *Lilly,* 527 U.S. at 146 (Rehnquist, C.J., concurring in the judgment) (quoting *Lee,* 476 U.S. at 541), and make it "highly unlikely" that Sylvia's statement is sufficiently reliable to satisfy the Confrontation Clause. *Lilly,* 527 U.S. at 137 (plurality opinion). As this Court explained in *Lee,* "[d]ue to [a codefendant's] strong motivation to implicate the defendant and to exonerate [herself], a codefendant's statement about what the defendant said or did are less credible than ordinary hearsay evidence." 476 U.S. at 541 (quotation omitted). This reasoning obviously applies with particular force when, as here, the declarant is a potential accomplice who realizes that she may or may not be charged with a crime depending in part on what she tells the police. *See Lilly,* 527 U.S. at 138 (plurality opinion) ("When a suspect is in custody for his obvious involvement in serious crimes, his knowledge that anything he says may be used against him militates against depending on his veracity.").

But the fact that Sylvia's statement constitutes a suspected accomplice's *ex parte* custodial statement is just one of several circumstances that severely undermine its reliability. Sylvia's statement described exclusively past events, thus lacking the "spontaneity" that sometimes suggests reliability. *Wright,* 497 U.S. at 821. Worse yet, several aspects of her physical and mental condition impeded her ability to record and relay reliable impressions of the events she observed. Sylvia acknowledged during her interrogation that she had been "pretty intoxicated" while at Lee's apartment, J.A. 88, a circumstance that "militates against" reliable recollections. *See Lilly,* 527 U.S. at 139 (plurality opinion). She also stated that she was "like in shock" during the stabbing, J.A. 134, which also would have impaired the accuracy of her observations and perhaps her memory as well. *See Wright,* 497 U.S. at 821 (indicating that altered "mental state" undermines reliability).

The manner in which the police interrogated Sylvia also undercuts the reliability of her statement. The plurality in *Lilly* held that the accomplice's custodial statement there was unreliable in part because he "was primarily responding to the officers' leading questions." 527 U.S. at 139; *see also* Blackstone, *supra,* at *373 (describing danger that examiner in *ex parte* examinations will "dress[] up" the testimony in "his own forms and language" to "make the witness speak what he never meant"). The same is true here. As the Washington Court of Appeals noted, Sylvia's custodial statement "consisted of answers to specific questions," J.A. 29, not of a lengthy narration or even a conversational give-and-take. *See also* J.A. 124-41 (transcript of statement). Indeed, on the critical issue of whether Petitioner acted in self-defense, the investigating officer asked Sylvia a leading question – whether Lee did anything "to fight back from this assault . . . after he was stabbed" J.A. 137 – that explicitly assumed Petitioner assaulted Lee before Lee attacked him. This question and others indicate that the police, as in *Lee,* "having already interrogated [the eventual defendant], no doubt knew what they were looking for" in examining his apparent accomplice. 476 U.S. at 544.

While a witness's "consistent repetition" under these circumstances might to some extent mitigate the effects of such questioning, *see Wright,* 497 U.S. at 821, Sylvia gave two inconsistent statements within about four hours, further indicating a lack of truthfulness. She first claimed, for instance, that Lee sexually assaulted her that day, J.A. 89-93, but she later maintained that he assaulted her several weeks before. J.A. 130-31. In addition, she first claimed that Lee invited her and Petitioner over to his apartment "to go drinking," J.A. 86, but she later maintained that they went over to collect a debt and to confront Lee about sexually assaulting her. J.A. 133. She also claimed initially that she did not see the stabbing because she was behind a wall. J.A. 93. After several hours in the stationhouse, however, she said that she saw Petitioner stab Lee, J.A. 134, but then added that she "shut [her] eyes" during the stabbing and "didn't really watch." *Id.*

The latter comments, in fact, generate concern not only because they are inconsistent with her earlier remarks but also because they show, as the Washington Court of Appeals observed, that "[c]ross-examination could reveal that [Sylvia] lacked knowledge of what happened." J.A. 30. At the very best, Sylvia claimed that she "didn't really watch" the critical events upon which Petitioner's self-defense claim turned. J.A. 134. It thus is almost impossible to imagine a cross-examination of Sylvia proving to be "of marginal utility," *Wright,* 497 U.S. at 820, even if its only purpose was to undercut the State's claim that her testimony strongly refuted Petitioner's claim of self-defense.

Finally, the part of Sylvia's statement that the Washington Supreme Court held "interlocked" with Petitioner's did so only in the sense that "both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. . . . '[N]either Michael or Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself.'" J.A. 18 (quoting dissent from court of appeals). But ambiguity is hardly an indicator of reliability, especially when the statement concerns a crucial factual matter that is presumably either so or not so. As this Court remarked in *Lee,* when an accomplice's statements bearing "to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statements poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." 476 U.S. at 545. Since the issue whether Lee was threatening to harm Petitioner lies at the heart of this case and "it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon," J.A. 18, Sylvia's statement's confluence with Petitioner's in that regard does not enhance its trustworthiness to the level that the *Roberts* framework requires to allow its admission against Petitioner.

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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